

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

GEORGE E. BARTON,  
  
Plaintiff,  
  
v.  
  
GARY W. SEWELL, GARTON &  
ASSOCIATES, REALTORS,  
  
Defendant.

No. CV-06-109-FVS

ORDER

**THIS MATTER** came before the Court, based upon the Defendants' Motion for Judgment on the Pleadings. The Defendants' are represented by Steve K. Gustafson. The Plaintiff is proceeding pro se.

**I.**

George E. Barton filed a complaint in the United States District Court for the Eastern District of Washington alleging that Gary Sewell and Garton & Associates, Realtors (hereinafter "the Defendants"), are liable for tortious and fraudulent conduct arising from a land purchase. Subject-matter jurisdiction is predicated upon diversity of citizenship. 28 U.S.C. § 1332. Now, the Defendants moves to dismiss Mr. Barton's amended complaint. Pursuant to Fed. R. Civ. P. 12 (b) (2), the Defendants submit that they are not subject to personal jurisdiction in the State of Washington when their only contacts with the State was the occasional returned phone call to Mr. Barton. Additionally, the Defendants move to dismiss on the grounds that Mr.

1 Barton failed to sufficiently serve process pursuant to Fed. R. Civ.  
2 P. 4(e) when he mailed but did not physically serve the Defendants  
3 with a copy of the Summons and Complaint. Mr. Barton has not  
4 submitted a response to the Defendants' motion.

## 5 II.

6 Mr. Barton has the burden of establishing that the court has  
7 personal jurisdiction. *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d  
8 1163, 1168 (9th Cir. 2006), *certiorari denied*, 127 S.Ct. 723, 166  
9 L.Ed.2d 560 (2006). A plaintiff must establish personal jurisdiction  
10 over each defendant individually. *Sher v. Johnson*, 911 F.2d 1357,  
11 1365 (9th Cir. 1990). Where the court's ruling is based solely upon a  
12 review of affidavits and discovery materials, dismissal is appropriate  
13 only if the plaintiff fails to make a prima facie showing of personal  
14 jurisdiction. *Id.* On this point, evidentiary materials are construed  
15 in the light most favorable to the plaintiff and unless directly  
16 contravened, the plaintiff's version of the facts are taken as true.  
17 *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328  
18 F.3d 1122, 1129 (9th Cir. 2003). Furthermore, "conflicts between the  
19 facts contained in the parties' affidavits must be resolved in  
20 [plaintiff's] favor for purposes of deciding whether a prima facie  
21 case for personal jurisdiction exists." *Id.*

## 22 III.

23 As a general matter, in the absence of a federal statute  
24 governing personal jurisdiction, the law of the state in which the  
25 district court sits governs whether the defendant is subject to  
26 personal jurisdiction. *Core-Vent Corp. v. Nobel Industries AB*, 11

1 F.3d 1482, 1484 (9th Cir.1993). Federal law applies to determine  
2 whether exercising personal jurisdiction is consistent with the  
3 defendant's right to due process. *Id.* This means that to establish  
4 personal jurisdiction, the plaintiff must show that the forum state's  
5 jurisdictional statute confers personal jurisdiction and that it  
6 comports with the federal due process clause. *Pacific Atlantic*  
7 *Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir.1985).

#### 8 IV.

9 Personal jurisdiction may be either general or specific.  
10 *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414  
11 n.9, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). A court properly  
12 exercises specific jurisdiction over a nonresident defendant where the  
13 suit "arises out of" or is related to the defendant's contacts with  
14 the forum and the defendant "purposefully avails itself of the  
15 privilege of conducting activities within the forum State, thus  
16 invoking the benefits and protections of its laws." *Burger King Corp.*  
17 *v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed.2 d 528  
18 (1985).

19 Alternatively, a court may exercise general jurisdiction over a  
20 defendant in a controversy unrelated to a defendant's contacts with  
21 the forum if the defendant has substantial "continuous corporate  
22 operations within a state" which are "of such a nature as to justify  
23 suit against [the defendant] on causes of action arising from dealings  
24 entirely distinct from those activities." *International Shoe, Co. v.*  
25 *State of Washington*, 326 U.S. 310, 318; 66 S. Ct. 154; 90 L. Ed. 95  
26 (1945). Due process considerations limit both general and specific

1 jurisdiction. *Helicopteros Nacionales*, 466 U.S. at 414.

2 Due process requires the defendant to "have certain minimum  
3 contacts with [the forum state] such that the maintenance of the suit  
4 does not offend 'traditional notions of fair play and substantial  
5 justice.'" *International Shoe*, 326 U.S. at 319. This means that the  
6 plaintiff must show that the defendant has sufficient connections with  
7 the forum state to subject it to the forum's jurisdiction and that  
8 "the assertion of jurisdiction is [otherwise] reasonable." *Amoco*, 1  
9 F. 3d. at 851 citing *Asahi Metal Indus. Co. v. Superior Court*, 480  
10 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). This approach applies  
11 to both general and specific jurisdiction analyses. *Amoco*, 1 F. 3d at  
12 851, n. 2. Yet courts have recognized that due process considerations  
13 requires a heightened standard for establishing general jurisdiction.  
14 *Tuazon*, 433 F.3d at 1168. Thus, general jurisdiction requires  
15 "contacts with the forum state must 'approximate physical presence.'" *Id.*  
16 quoting *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d  
17 1082, 1086 (9th Cir.2000).

18 Here, the parties agree that the Defendants are Oregon residents  
19 (Compl. at 1-2, ¶¶ 2-3, Aff. of Sewell at 2, ¶ 3) and that the real  
20 estate underlying the cause of action is located in Oregon. (Compl.  
21 at 4, ¶ 9). The parties disagree over the quality and nature of the  
22 Defendants' contacts with the State of Washington. Mr. Barton alleges  
23 that the Defendants' tortious conduct arose through a series of phone  
24 calls and written faxes and letters they made to him at his Washington  
25 residence. (Compl. at 2-3.) Furthermore, Mr. Barton alleges that  
26 Defendant Sewell traveled to Walla Walla, Washington to discuss

1 matters related to the sale of the property. (Compl. at 3.) Mr.  
2 Barton also alleges that Defendant Garton & Associates actively  
3 advertised its business in magazines circulated to Washington  
4 residents. (Compl. at 3.)

5 Conversely, in its Motion for Judgment on the Pleadings, the  
6 Defendants argue that their real estate business is solely limited to  
7 selling Oregon property within the State of Oregon (Memo. in Support  
8 at 4) and the only contact they had with the State of Washington  
9 during the period in question was returning Mr. Barton's phone calls  
10 (Memo. in Support at 5). The Defendants' dispute Mr. Barton's  
11 contention that Defendant Sewell traveled to Washington to discuss the  
12 real estate transaction. (Sewell Aff. at 2, ¶ 6.) Factual and  
13 documentary conflicts are construed in favor of the plaintiff. *Harris*  
14 *Rutsky & Co.*, 328 F.3d at 1129. Therefore, it is first necessary to  
15 evaluate whether Mr. Barton has sufficiently established that the  
16 State of Washington has either specific or general personal  
17 jurisdiction over the Defendants.

18 V.

19 Washington's Long Arm Statute RCW 4.28.185 deals with specific  
20 jurisdiction over nonresident defendants. *Amoco Egypt Oil Co. V.*  
21 *Leonis Navigation Co., Inc.*, 1 F.3d 848, 850 (9th Cir. 1993). Under  
22 RCW 4.28.185(1)(a), a nonresident corporation submits itself to the  
23 jurisdiction of Washington courts related to causes of action that  
24 arise out of its business transactions within the state. The statute  
25 "was intended to be operative to the full extent allowed by due  
26 process except where limited by the terms of the statute." *Werner v.*

1 *Werner*, 84 Wash. 2d. 360, 365, 526 P.2d 370, 375 (1974). To satisfy  
2 due process, the plaintiff must show that (1) the nonresident  
3 defendant purposely availed himself of the privilege of conducting  
4 business in the forum; (2) the suit arises out of the defendant's  
5 forum-related activity; and (3) the exercise of jurisdiction would be  
6 reasonable. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et*  
7 *L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006). These  
8 requirements are conjunctive, meaning that the plaintiff must  
9 establish all three prongs for the court to assert jurisdiction. *Rand*  
10 *v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993).

11 Purposeful availment "examines whether the defendant's contacts  
12 with the forum are attributable to his own actions or are solely the  
13 actions of the plaintiff." *Roth v. Garcia Marquez*, 942 F.2d 617, 621  
14 (9th Cir. 1991). The purpose underlying this prong is to ensure that  
15 "a defendant will not be haled into a jurisdiction solely as a result  
16 of random, fortuitous, or attenuated contacts, or of the unilateral  
17 activity of another party or a third person." *Burger King Corp. v.*  
18 *Rudzewicz*, 471 U.S. at 474.

19 In the Ninth Circuit, the plaintiff's evidentiary burden in  
20 establishing purposeful availment differs if his claims are grounded  
21 in theories of contract or tort. *Roth*, 942 F.2d at 621; see also  
22 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir.  
23 2004) (explaining that a "purposeful availment" analysis applies to  
24 contract claims, whereas "purposeful direction" analysis applies to  
25 tort claims). This action alleges the Defendants' engaged in tortious  
26 conduct. In tort cases, "activity by the defendant need not

1 physically take place in the forum state so as to constitute  
2 sufficient contact under the due process test." *Haisten v. Grass*  
3 *Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir.  
4 1986). Rather, personal jurisdiction is appropriately exercised  
5 "over a defendant whose only contact with the forum state is the  
6 purposeful direction of a foreign act having *effect* in the forum  
7 state." *Roth*, 942 F.2d at 621 (citing *Calder v. Jones*, 465 U.S. 783,  
8 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)).

9 Applying the "*Calder* effects test," the Ninth Circuit has held  
10 that the "brunt of the harm need not be felt in or suffered in the  
11 forum state." *Yahoo! Inc.*, 433 F.3d at 1207. Instead, the plaintiff  
12 need only show a "jurisdictionally sufficient amount of harm is  
13 suffered in the forum state." *Id.* Purposeful direction and  
14 sufficiency of harm are determined by examining the totality of the  
15 defendants' contacts under the circumstances. *Id.* at 1210 (explaining  
16 that "we consider the extent of the defendant's contacts with the  
17 forum and the degree to which the plaintiff's suit is related to those  
18 contacts...[a] strong showing on one axis will permit a lesser showing  
19 on the other.")

20 The Supreme Court has noted that a defendant who actively  
21 advertises in the forum state, establishes channels for providing  
22 regular advice to customers within the forum State, or markets the  
23 product in the forum state through a sales agent are sufficient  
24 contacts to show a "substantial connection" with the forum state.  
25 *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480  
26 U.S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (discussing

1 personal jurisdiction in the context of products manufactured in the  
2 stream of commerce).

3 Consistent with this, the Western District Court of Washington  
4 was presented with a case involving a Washington resident who brought  
5 a lawsuit alleging several defendants engaged in a fraudulent  
6 misrepresentation scheme related to a series of investment  
7 enterprises. *Silver Valley Partners., LLC v. De Motte*, 400 F. Supp. 2d  
8 1262, 1264 (2005). Specifically, the court addressed whether it had  
9 personal jurisdiction when all the defendants were Idaho residents,  
10 all contacts between the plaintiff and defendants occurred in Idaho  
11 and the "investments all dealt with activities occurring, and  
12 enterprises operating, entirely within Idaho." *Id.*

13 The district court held it did not have personal jurisdiction as  
14 to three of the four defendants because the plaintiff's mere claims  
15 that the defendants' had minimum contacts with Washington and had  
16 purposely availed themselves of Washington's courts was insufficient  
17 standing alone. *Id.* at 1268-69. However, the court held that  
18 "purposeful and repeated communication with a Washington resident  
19 resulting in the investment of millions of dollars in out-of-state  
20 enterprises is sufficient to confer in personam jurisdiction over the  
21 out-of-state solicitor for claims arising out of such solicitations."  
22 *Id.* at 1266. The district court reasoned that although "the fact  
23 that [the defendant] did not travel to Washington," and the  
24 investments dealt with purely Idaho investments, nevertheless, the  
25 defendant had purposefully availed himself of the privilege of  
26 conducting activities in Washington when he actively *targets* customers



1 within the state. *Id.*

2 On the other hand, in *Peterson v. Kennedy*, the Ninth Circuit  
3 addressed whether the State of California had personal jurisdiction  
4 over the defendants in an action by a football player against his  
5 former player's union for misrepresentation. 771 F.2d 1244, 1262 (9th  
6 Cir. 1985). The court held that as a matter of law, California lacked  
7 personal jurisdiction over the defendants because they had not  
8 purposefully availed themselves of California's laws when their sole  
9 contacts with the forum state "consisted of a series of telephone  
10 calls...and letters" sent from their Washington D.C. offices. *Id.*  
11 The court reasoned that "ordinarily 'use of the mails, telephone, or  
12 other international communications simply do not qualify as purposeful  
13 activity invoking the benefits and protection of the [forum] state.'" *Id.*

15 Here, Mr. Barton claims that the Defendants' advertised their  
16 real estate business in the State of Washington and solicited business  
17 from him directly through phone calls, mailed correspondences and on  
18 one occasion, Defendant Sewell's act of driving into Walla Walla,  
19 Washington to discuss the underlying Oregon land sale with Mr. Barton.  
20 The only evidence Mr. Barton has presented to corroborate his claims  
21 of personal jurisdiction are two undated letters received from  
22 Defendant Sewell. This alone does not establish that any of the  
23 defendants' actively solicited business in Washington.

24 Rather, like in *Peterson*, Mr. Barton has failed to show that the  
25 defendants intentionally directed their actions toward Washington in a  
26 way that would lend to a reasonable expectation of being haled into

1 court here. Washington is not the "focal point" of both the story and  
2 the harm that Mr. Barton asserts. *See Calder*, 465 U.S. at 789  
3 (explaining the forum State must be "the focal point both of the story  
4 and of the harm suffered"). Although, Mr. Barton may assert that he  
5 suffered harm in Washington by virtue of the telephone calls, faxes  
6 and letters, this alone is insufficient to exercise specific  
7 jurisdiction. *Peterson*, 771 F.2d at 1262; *see also Lewis v. Bours*,  
8 119 Wash.2d 667, 673-74, 835 P.2d 221, 225 (1992) (holding that when  
9 "a nonresident professional commits malpractice in another state  
10 against a Washington State resident, that, standing alone, does not  
11 constitute a tortious act committed in this state regardless of  
12 whether the Washington State resident suffered injury upon his or her  
13 return to Washington.") Therefore, based on the foregoing,  
14 Washington does not have specific jurisdiction over the Defendants.

## 15 VI.

16 In the State of Washington, "general jurisdiction is authorized  
17 by § 4.28.080(10), which provides for service of summons on a foreign  
18 corporation "doing business" in Washington." *Id.* Washington courts  
19 have interpreted this provision as conferring general personal  
20 jurisdiction over nonresident defendants who conduct "substantial and  
21 continuous business in the state of such a character as to give rise  
22 to a legal obligation." *Hein v. Taco Bell, Inc.*, 60 Wash. App. 325,  
23 328-29, 803 P.2d 329 (1991) (citing *Croese v. Volkswagenwerk*  
24 *Aktiengesellschaft*, 88 Wash.2d 50, 54, 558 P.2d 764, 766-67 (1977)).  
25 To determine whether a substantial and continuous business  
26 relationship exists with the forum state, Washington courts and the

1 Ninth Circuit conduct a similar "fact intensive, case-by-case  
2 analysis" which entails a two part inquiry into: (1) the "nature and  
3 extent of the [defendants'] contacts" *Tuazon*, 433 F.3d at 1172; and  
4 (2) the reasonableness of asserting jurisdiction. *Amoco*, 1 F.3d at  
5 851. This test is conjunctive, meaning the plaintiff must establish  
6 both prongs for the court to exercise general jurisdiction. *Id.*  
7 (holding that general jurisdiction was lacking because the  
8 reasonableness prong was not satisfied); see also *Doe v. Unocal Corp.*,  
9 248 F.3d 915, (9th Cir. 2001) (holding that general personal  
10 jurisdiction was improper because the plaintiff had failed to show the  
11 defendants had sufficient contacts with the forum state).

12 In determining a defendant's contacts, courts evaluate such  
13 factors as the "[l]ongevity, continuity, volume, economic impact,  
14 physical presence, and integration into the state's regulatory or  
15 economic markets." *Id.* The plaintiff must present affirmative  
16 evidence that the defendant has made himself "at home in the  
17 forum" such as setting up "most aspects of its operations" in the state.  
18 *Glencore Grain Rottendam v. B.V. v. Shivnath Rai Harnarain Co.*, 284  
19 F.3d 1114, 1125 (9th Cir. 2002); see also *Perkins v. Benguet Consol.*  
20 *Mining Co.*, 342 U.S. 437, 447-48, 72 S. Ct. 413, 96 L. Ed. 485 (1952)  
21 (corporation's president maintained an office, kept files, held  
22 directors meetings, distributed salaries, and conducted other business  
23 in the forum state). "Engaging in commerce with residents of the  
24 forum state is not in and of itself the kind of activity that  
25 approximates physical presence within the state's borders." *Glencore*  
26 *Grain*, 284 F.3d at 1124-25 (explaining that although defendant

1 corporation had "stepped through the door [of the forum state]"  
2 through exporting rice into California, "there [was] no indication  
3 that it ha[d] sat down and made itself at home.")

4 Here, Mr. Barton's tortious claims arose outside of Washington.  
5 The Defendants are all Oregon residents, the underlying real estate  
6 was located in Oregon and the purchasing agreement stated Oregon law  
7 would apply in the event of a subsequent disagreement between the  
8 parties. Although Mr. Barton asserts that the Defendants' advertised  
9 in the State of Washington, he has not produced any evidence to  
10 confirm or deny this allegation.

11 Even assuming *arguendo* that Mr. Barton's unsubstantiated  
12 statements are true, advertising alone is insufficient to confer  
13 general jurisdiction for an unrelated cause of action when the  
14 defendants do not operate a Washington office, employ Washington  
15 residents or sell Washington property. *Bancroft & Masters, Inc. v.*  
16 *Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (explaining  
17 that the defendant's "occasional, unsolicited sales of tournament  
18 tickets and merchandise to California residents are insufficient to  
19 create general jurisdiction.") Therefore, the State of Washington  
20 lacks general personal jurisdiction over the defendants.

21 **IT IS HEREBY ORDERED:**

22 The Defendants' Motion for Judgment on the Pleadings, **Ct. Rec.**  
23 **47**, CV-06-109-FVS, is **GRANTED**. The Plaintiff's claims against the  
24 Defendants are dismissed without prejudice.

25 /

26 /

s/ Fred Van Sickle  


---

Fred Van Sickle  
United States District Judge